E.S.P. Concrete Pumping, Inc. *and* Local 47, International Union of Bricklayers ad Allied Craftsman, AFL–CIO. Case 4–CA–20570

February 23, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, HURTGEN, AND BRAME

On August 31, 1993, Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

The Respondent has excepted to the judge's finding that it violated Section 8(a)(5) and (1) by repudiating its collective-bargaining agreement with the Union. For the reasons that follow, we agree with the judge that the Respondent's conduct violated the Act.

The facts, as found by the judge or undisputed in the record, follow.

E.S.P. Concrete Pumping Company (the Company) was a sole proprietorship owned and operated by Edwin Piatt and engaged in the business of pouring, placing, and finishing concrete at construction jobsites. In May 1988, Piatt signed a collective-bargaining agreement with the Keystone Building Constructors Association and Bricklayers Local Union No. 47 (Bricklayers), which was effective by its terms from May 1, 1988, to April 30, 1993, and which covered all projects in Schuylkill County, Pennsylvania. On November 15, 1989, Edwin Piatt died.

At the time of Piatt's death, the Company had one contract, for cement work at the Minersville, Pennsylvania Federal prison, and it was applying the Bricklayers agreement to that job. The Company continued to perform work on the job under the direction of Piatt's widow, Lillian Piatt, and sons, Paul and Christopher Piatt, and to abide by the Bricklayers' collective-bargaining agreement. On January 2, 1990, the Piatts incorporated the Respondent, E.S.P. Concrete Pumping Company, Inc., a Pennsylvania corporation, with the same place of business as the Company and engaged in the same line of work. Lillian Piatt became president and sons Christopher and Paul became secretary-treasurer and vice president, respectively. The sole proprietorship ceased to exist on the date the Respondent was incorporated.

The Respondent continued to perform work on the Minersville prison contract throughout 1990, and to apply the Bricklayers' agreement there. Thus, the Respondent deducted and remitted union dues from employees' pay, dealt with the Union over work disputes, applied all contract terms covering wages, hours, and working conditions, and made required payments to the Union's pension and health and welfare funds.[1]

In late 1991, the Respondent was awarded a subcontract to place and finish concrete slabs on a project at the Frackville, Pennsylvania State Prison, also located in Schuylkill County. The primary contractor at the Frackville prison jobsite was Morris Kreitz and Sons, a union general contractor that was signatory to the Bricklayers' agreement and that also required its subcontractors to be union contractors. On November 27, 1991, the Morris Kreitz construction manager, Bruce Merlino, asked Paul Piatt whether the Respondent was a union contractor and notified him that application of the union contract was an absolute prerequisite for the job. Piatt assured Merlino that the Respondent was a union contractor and that he would apply the Bricklayers' contract at the Frackville site. Based on these assurances, Kreitz awarded a subcontract to the Respondent.[2] The work order confirming Piatt's verbal agreement was signed and stamped "E.S.P. Concrete Pumping Co. [the name of the predecessor], Lillian Piatt, President."

On December 27, 1991, after the Respondent had commenced work at the state prison jobsite, Paul Piatt told the Union's business representative that the "Company was not going to be union anymore and that no one is going to stop the Company from going non-union." The Respondent did not apply the terms and conditions of the collective-bargaining agreement to its employees on the Frackville job.

The complaint alleged, and the judge concluded, that by repudiating the collective-bargaining agreement in December 1991, the Respondent violated Section 8(a)(5) and (1). In so doing, the judge found that the Respondent had adopted the collective-bargaining agreement previously entered into by Edwin Piatt on behalf of the Company and applied its terms and reaped its benefits until it repudiated the agreement.

The Respondent contends that the judge erred in finding that it was bound by an 8(f) agreement in the absence of a signed commitment to be bound, citing *Garman Construction Co.,* 287 NLRB 88, 89 fn. 5 (1987), in which the Board stated, in dicta, that it did not find the "adoption-by-conduct rule applicable in 8(f) cases." For the reasons that follow, we find that the principles of

[1] On April 16, 1992, the Respondent acquiesced in penalties imposed by a judgment that was entered against it for underpayment of benefit fund contributions under the Bricklayers' agreement.

[2] According to Kreitz' construction manager, the union representatives on the job agreed that if all subcontractors were unionized there would be no work stoppages on the Frackville job. Moreover, Kreitz' collective-bargaining agreement with the Union contained a union signatory subcontracting clause applicable to the state prison jobsite. The judge found that the Respondent would not have received the Frackville contract if it had not told Merlino that it was a union contractor and that it would apply the Bricklayers' agreement.

"adoption by conduct" of a collective-bargaining agreement, properly understood, are applicable to agreements covered by Section 8(f) as well as Section 9(a), and that once an employer has voluntarily adopted a contract, it is foreclosed under *John Deklewa & Sons*[3] from repudiating it during its term. To the extent that the *Garman* dicta is to the contrary, that case is overruled.[4] Accordingly, we reject the Respondent's contentions and adopt the judge's conclusion that the Respondent unlawfully repudiated its agreement with the Union.

The fundamental factual question presented is whether the Respondent voluntarily adopted the 1988–1993 Bricklayers' collective-bargaining agreement following the dissolution of the predecessor sole proprietorship in 1990. Prior to the Board's decision in *Deklewa,* it was well settled that a union and employer's adoption of either an 8(f) or 9(a) labor contract "is not dependent on the reduction to writing of the intention to be bound," but instead, "what is required is conduct manifesting an intention to abide by the terms of an agreement."[5] We find that these principles are entirely consistent with Section 8(f) and, contrary to the *Garman* dicta, were not uprooted in the 8(f) context by the Board's decision in *Deklewa.*

The issue in *Garman* was whether the employer had violated Section 8(a)(5) and (1) by making unilateral changes in terms and conditions of employment *following* the expiration of an 8(f) agreement. The employer had been bound by an agreement that expired in 1978, and had continued to comply with the terms of an unsigned successor agreement which expired in the spring of 1981. The employer had also participated in a conference with union representatives to resolve a jurisdictional dispute and had bargained with the union for a new agreement after the 1981 expiration date.[6]

The administrative law judge in *Garman* found that the employer had adopted the 1978–1981 collective-bargaining agreement by this conduct. Under the then-applicable legal standard, the judge found that the 8(f) collective-bargaining relationship had matured to 9(a) status based on evidence of majority status and a stable work force and that the employer had violated Section 8(a)(5) and (1) by withdrawing recognition, failing to bargain in good faith, and unilaterally changing terms and conditions of employment after the 1978–1981 agreement had expired.

The Board reversed the judge's finding of a violation in light of the principle announced in *Deklewa* that, inter alia, an employer's bargaining obligation to a union ends when an 8(f) agreement expires. Finding that the employer had not entered into any bargaining relationship after 1978, the Board concluded that under *Deklewa* the employer was free to withdraw recognition from the union and make unilateral changes in 1981 as it had done. The Board referred, in a footnote, to the judge's adoption by conduct finding, and stated, without any explanation, that "[w]e do not find this adoption-by-conduct doctrine to be applicable in 8(f) cases." *Garman*, supra, 287 NLRB at 89 fn. 5.

Initially, we note that this comment was not necessary to the disposition of the issue presented in *Garman*. Even if the Board had found that the employer there had adopted the 1978–1981 agreement, that contract had expired by its terms prior to the employer's alleged 1981 refusal to bargain and there was no allegation in that case that the employer had adopted any successor agreement. Accordingly, the employer was privileged under *Deklewa* to repudiate its bargaining relationship with the union when it did, regardless of whether it had been bound by the expired agreement. Thus, the Board's comment concerning the judge's finding of adoption by conduct was mere dicta.[7]

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[3] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

The judge made no findings that the Respondent and the Company were single employers, alter egos, or that the Respondent was a disguised continuance of the Company, and no party has excepted to his failure to so find. Accordingly, the Respondent was free to abandon the contract at the time the single proprietorship was dissolved simply by failing to adopt it.

[4] Member Hurtgen finds it unnecessary to overrule *Garman.* In that case, the Board stated the following in the relevant footnote:

> The judge found that the Respondent had adopted the Laborers' and Carpenters' master contracts through its actions in following numerous provisions of the master contracts. We do not find *this* adoption-by-conduct doctrine to be applicable in 8(f) cases. [Emphasis added.]

Member Hurtgen agrees that "this" adoption-by-conduct doctrine should not be endorsed. That is, an employer should not be deemed to have adopted an 8(f) contract simply because that employer follows "numerous provisions" thereof.

[5] *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355–356 (5th Cir. 1981) (en banc) (footnotes and citations omitted), enfg. 236 NLRB 79 (1978); accord: *Arco Electric v. NLRB*, 618 F.2d 698 (10th Cir. 1980) ("whether particular conduct in a given case demonstrates the existence or adoption of a contract is a question of fact"), enfg. 237 NLRB 708 (1980); *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964) (in deciding whether an employer and a union have agreed upon a contract the Board is not bound by the technical rules of contract law); *NLRB v. Truck Drivers Local 100*, 532 F.2d 569, 571 (6th Cir. (1976)), cert. denied 429 U.S. 859 (1976) (same).

[6] Significantly, there was no allegation in *Garman* that the employer had failed to comply with the agreement between 1978 and 1981; rather, the only allegation was that the employer had failed to meet its obligation to maintain the status quo under Sec. 8(a)(5) and (d) *after* the 1978–1981 agreement had expired.

[7] We recognize that the Ninth Circuit has found that the *Garman* dicta was a reasonable construction of Sec. 8(f). See *Hawaii Carpenters Trust Funds v. Henry*, 906 F.2d 1349, 1355 (9th Cir. 1990). However, the court's decision was based on its deference to the Board's construction of the Act. For the reasons set forth in this decision, we find that applying the same principles used to determine whether a collective-bargaining agreement has been formed in 8(f) and 9(a) cases better reflects the policies of the Act. We note in this regard, that the Ninth Circuit has agreed with the Board that adoption of a collective-bargaining agreement may be established by conduct in 9(a) cases. *Bay Area Typographical Union v. Alameda Newspaper,* 900 F.2d 197 (9th Cir. 1990).

Nothing in the text or legislative history of Section 8(f) requires the Board to depart from its traditional principles of contract interpretation, including the adoption by conduct doctrine, in 8(f) cases. Section 8(f) provides, in pertinent part, that it shall not be an unfair labor practice for an employer and a union in the construction industry to "make an agreement" without the union first having established its majority status pursuant to Section 9 of the Act. Except for its mandate that such agreements be voluntary,[8] there is no indication that Congress intended to establish special rules for the "making" of such agreements. See *Scandia Stucco Co.,* 319 NLRB 850, 855 (1995) (agreement to engage in multiemployer bargaining for an 8(f) contract need not be manifested by a written agreement).

We further find that applying the adoption by conduct principles in 8(f) cases effectuates the Congressional labor policies for the construction industry as embodied in Section 8(e) and (f).[9] As the Supreme Court recognized in *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983):

> However limited the binding effect of a prehire agreement may be, it strains both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained-for consideration. Nothing in the legislative history of §8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper. [Footnote omitted.]

Likewise, recognizing the unique possibility of "jobsite friction that could exist when union and nonunion workers were employed on the same construction site,"[10] Congress exempted certain collectively bargained agreements in the construction industry from the prohibition against so-called "hot cargo clauses" set forth in Section 8(e). Allowing employers, like the Respondent, to obtain work at a jobsite covered by such an agreement by claiming to be a union signatory employer, and then to avoid their contractual obligations by claiming that no valid agreement exists, would subvert the intent of Congress in enacting the 8(e) construction industry proviso, as well as Section 8(f), and unnecessarily risk jobsite work stoppages and other disruptions of commerce when the employer's duplicity is discovered.

Our conclusion that the adoption by conduct principles are applicable in 8(f) cases is also consistent with the Board's decision in *Deklewa*. In *Deklewa*, the Board found that an 8(f) agreement was enforceable during its term through Section 8(a)(5) and (b)(3), unless the employees voted to reject or change their bargaining representative. The Board concluded that the limited enforceability of 8(f) agreements was a reasonable quid pro quo for the benefits the employer received from being party to an 8(f) agreement, "that is imposed only when an employer voluntarily recognizes the union, enters into a collective-bargaining agreement, and then set 5 about enjoying the benefits and assuming the obligations of the agreement." 282 NLRB at 1387. In contrast to *Garman*, the parties in *Deklewa* did not dispute that a valid 8(f) collective-bargaining agreement existed at the time it was repudiated by the employer. The Board thus had no occasion to pass on the requirements for establishing that such an agreement has been "made." However, the Board did state in *Deklewa* that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry."[11] Our holding today is consistent with this principle.

In summary, we have decided to reaffirm in the 8(f) context the Board's longstanding rule that an employer and a union may enter into a collective-bargaining agreement without having reduced to writing their intent to be bound. Instead, the formation of a contract is established by conduct demonstrating an intent to be bound by the terms of the agreement. These principles are equally applicable to 8(f) and 9(a) agreements. Indeed, their application in the 8(f) setting is necessary to promote industrial peace and effectuate the intent of Congress with respect to the adoption of collective-bargaining agreements in the construction industry.

Applying the foregoing principles to the facts of this case, we find that the Respondent adopted the Bricklayers' agreement by its voluntary conduct. Thus, the Respondent had not only voluntarily completed the Minersville job, applying the collective-bargaining agreement to the work, but acquiesced in a judgment against it for unpaid contributions to the Bricklayers' Pension Fund.[12] In addition, the Respondent deliberately held itself out as a union contractor in representations made for the purpose of obtaining a contract from Morris Kreitz for work on

[8] *Deklewa*, supra, 282 NLRB at 1381. Our finding below that the Respondent adopted the 1988–1993 agreement is fully consistent with this principle, however, as the finding is based solely on the Respondent's voluntary conduct.

[9] See *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48, 51 (1991) (provisions of Sec. 8(f) relevant to construction of Sec. 8(e)).

Sec. 8(e) generally prohibits employers and unions from entering into agreements: (1) in which the employer agrees to cease doing business with any other person; and (2) that have a secondary objective. The construction industry proviso to Sec. 8(e), however, authorizes certain types of otherwise unlawful secondary agreements in the construction industry. See generally *Carpenters District Council of Northeast Ohio (Alessio Construction),* 310 NLRB 1023 (1993).

[10] *Laborers Local 210 v. AGC*, 844 F.2d 69, 76 (2d Cir. 1988) (explaining construction industry proviso to Sec. 8(e)).

[11] 282 NLRB at 1387 fn. 53.

[12] See *Haberman Construction Co.,* supra, 236 NLRB at 85 (acquiescence in penalties imposed for breach of collective-bargaining agreement an indication of adoption of contract).

the Frackville project in 1991.[13] Under these circumstances, "it makes little difference whether that conduct be appraised as expressing the intent of the parties to an ambiguous contract or as the creation of an estoppel against repudiation." *Arco Electric Co. v. NLRB,* supra, 618 F.2d at 699. As the Supreme Court observed in *McNeff,* "Having had the music, [the Respondent] must pay the piper." *McNeff*, supra, 461 U.S. at 271. In the language of *Deklewa*, the Respondent "voluntarily recognize[d] the union, enter[ed] into a collective-bargaining agreement, and then set[ ] about enjoying the benefits and assuming the obligations of the agreement." 282 NLRB at 1387.[14] Therefore, we find that the Respondent voluntarily adopted the Bricklayers' agreement signed by Edwin Piatt. Respondent thus was bound by the Bricklayers' 1988–1993 collective-bargaining agreement at the time of its repudiation of that agreement in 1991, and that its repudiation was, accordingly, unlawful.[15]

REMEDY

Having found that the Respondent has committed certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[16] We shall order the Respondent to comply with the terms of its collective-bargaining agreement with the Union from May 1, 1988, through the expiration of the agreement on April 30, 1993.[17] We shall also order the Respondent to make whole the employees covered by that agreement for any losses they may have suffered as a result of the Respondent's failure to comply with the 1988–1993 contract in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970).[18] We shall also order the Respondent to pay to the appropriate health and welfare, pension, and education funds the contributions required under the 1988–1993 contract and to make whole employees for any losses suffered as a result of the Respondent's failure to make the contributions in the manner set forth in *Kraft Heating & Plumbing,* 252 NLRB 891 (1980).[19] All payments to employees shall be made with interest as computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, E.S.P. Concrete Pumping, Inc., Sweet Valley, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement from Local 47, International Union of Bricklayers and Allied Craftsmen, AFL–CIO as the collective-bargaining representative of the Respondent's employees covered by the agreement.

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[13] Kreitz' contract with the Union contained a union signatory clause, the application of which both parties considered necessary to avoid work stoppages.

In this regard, the Respondent's work order confirming its agreement with Kreitz was signed and stamped "E.S.P. Concrete Pumping Co.," the name of the predecessor, "Lillian Piatt, President." Thus, it is highly unlikely that Kreitz could have inferred from the work order that it was dealing with a legal entity, E.S.P. Concrete Pumping, Inc., that was different from the sole proprietorship.

We recognize that some nonunion employers may elect to maintain the same wage rates and benefit levels as those prescribed in a collective-bargaining agreement. Nothing in this decision should be read to establish that the Board will find that an employer is bound by an 8(f) agreement merely because it has paid wages and benefits equivalent to those specified in such an agreement.

[14] See also *Scandia Stucco Co.,* supra, 319 NLRB at 856 (employer bound to multiemployer agreement, where, inter alia, it complied with major provisions and held itself out as a union contractor, despite failure to indicate continued membership in multiemployer bargaining group in writing; its self-serving silence about its limited intentions in joining the multiemployer bargaining group is not sufficient to put other contractors with economic stakes in labor costs on notice of its intentions).

[15] We find no merit in the Respondent's argument that it was incumbent upon the Union to approach it with an agreement if it wished to continue a bargaining relationship. There is no evidence that the Respondent informed the Union that it had dissolved the Company and started up a new concern that was acting in the Company's stead. Further, the Respondent's voluntary acceptance of the terms of the collective-bargaining agreement was a substitute for the process of arriving at terms and conditions of employment for the Respondent's unit employees.

[16] We have in our new Order and notice modified the judge's recommended remedy and notice to include appropriate remedial provisions.

[17] In Member Hurtgen's view, an employer who agrees to honor a contract on a job in order to work on that job is obligated to abide by that contract for the duration of that job. However, it does not necessarily follow that the employer has agreed to that contract generally, i.e., for future jobs. Thus, it may be inappropriate to enter an order requiring adherence to the contract generally. However, in the instant case, Respondent did more than simply agree to the contract in order to get the job at Frackville. Respondent also honored the contract at Minersville and acquiesced to a judgment there. There is no showing that adherence to the contract at Minersville was a necessary precondition for performing the Minersville job. In these circumstances, Member Hurtgen agrees with the remedial order which obligates Respondent to honor the contract generally.

[18] See *Wilson & Sons Heating*, 302 NLRB 802, 806 (1991), enf. denied on other grounds 971 F.2d 758 (D.C. Cir. 1992).

Contrary to the judge, we shall not require compliance with the "referral system" as part of the remedy in this case. In this regard, the complaint alleges only that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Union and by repudiating the 1988–1993 Bricklayers collective-bargaining agreement during the term of that agreement. Because that agreement does not contain an express hiring hall provision, and there is no showing that any practice of using the Union for referrals that may have existed had become an implied term of that agreement, there is no basis for requiring the Respondent to utilize the Union for referrals in order to remedy the unfair labor practices found herein.

[19] Because the provisions of employee benefit fund agreements are complex and variable, any additional amounts owed with respect to the employee benefit funds will be determined at the compliance stage in accordance with the procedure set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979).

(b) Repudiating the May 1, 1988, to April 30, 1993 collective-bargaining agreement between the Respondent and the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, any employees covered by the collective-bargaining agreement for any losses they may have suffered as a result of the Respondent's failure to comply with the agreement until it expired on April 30, 1993.

(b) Comply with the provisions of the 1988–1993 agreement, including making the contractually required contributions to the appropriate health and welfare and pension funds, and other contributions required to be paid by the 1988–1993 agreement.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Sweet Valley, Pennsylvania facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by and other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in theses proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 1992.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition during the term of a collective-bargaining agreement from Local 47, International Union of Bricklayers and Allied Craftsmen, AFL–CIO as the collective-bargaining representative of our employees covered by the agreement.

WE WILL NOT repudiate our May 1, 1988, to April 30, 1993 collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL make whole, with interest, any employees covered by the collective-bargaining agreement for any losses they may have suffered as a result of our failure to comply with the agreement until it expired on April 30, 1993.

WE WILL comply with the provisions of the 1998–1993 agreement, including making the contractually required contributions to the appropriate health and welfare and pension funds, and other contributions required to be paid by the 1988–1993 agreement.

E.S.P. CONCRETE PUMPING, INC.

Carmen Cialino Jr., Esq., for the General Counsel.
John Rybolt, Esq., for the Respondent.
Stephen Richmond, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Pottsville, Pennsylvania, on November 16, 1992, upon unfair labor practice charges filed on March 19, 1992. Complaint and amendments were issued on May 28 and November 6, 1992.

Respondent's answers to the complaint and amendments denied the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce rele-

vant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record, and based on my observation of the witnesses and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation with an office and place of business located in Sweet Valley, Pennsylvania, where it is engaged as a contractor in the business of pumping, pouring, placing, and finishing concrete at construction jobsites. The parties stipulated that during the past year Respondent provided services in excess of $50,000 to employers who are directly engaged in interstate commerce.

The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

E.S.P. Concrete Pumping Company was a sole proprietorship owned and operated by Edwin Piatt. This company was engaged in the same business at the same location as the later-formed corporation of the same name. In May 1988, Edwin Piatt signed a collective-bargaining agreement with the Keystone Building Constructors Association and Bricklayers, Local Union No. 47, which was effective from May 1, 1988, to April 30, 1993. The agreement requires employees to become members of the Union after the eighth day of employment and provides for wages, hours, working conditions, and benefits. On November 15, 1989, Edward Piatt died.

On January 2, 1990, the sole proprietorship ceased to exist when E.S.P. Concrete Pumping Company, Inc. was formed. Lillian Piatt, wife, became president and sons Christopher became secretary-treasurer and Paul became vice president.

The terms and conditions of the collective-bargaining agreement were applied to all relevant E.S.P. employees working for the sole proprietorship and were continued and applied to all employees working for the corporation. For example, on the Federal prison job at Minersville, Pennsylvania, during 1990, employees were referred to the jobsite by the Union. Union dues were deducted and remitted to the Union along with all required payments to the Union's pension and health and welfare funds. Furthermore, all contract terms covering wages, hours, and working conditions were met by Respondent corporation.

However, on December 27, 1991, at the Frackville State Prison jobsite, Paul Piatt told the Union that the corporation would no longer recognize the Union. Thereafter, Respondent did not apply the terms and conditions of the labor agreement to any of its employees.[1]

Morris Kreitz and Sons was a contractor on the Frackville Prison job. Bruce Merlino was the construction manager for Kreitz who had a labor agreement with the Bricklayers Union, which required that labor agreements would apply to all subcontractors on this job. On November 27, 1991, Paul Piatt told Merlino that he would apply the union contract on this job which lasted at least until Merlino left Kreitz on July 31, 1992. E.S.P. Corporation started work on this job in January 1992. However, the labor agreement was not applied to E.S.P. employees on this job or any other job thereafter.

Paul Piatt testified that he applied the labor agreement on the Minersville job because his father made that commitment when he was alive. He stated that once his father died, the labor agreement died with him.

Analysis and Conclusions

All the evidence is undisputed or admitted. It is clear, and I find that the sole proprietorship entered into a collective-bargaining agreement with the Union, assuming the obligations and enjoying the benefits.

It is also clear that since January 2, 1990, the corporation did the same thing. The corporation adopted the agreement on the day it was incorporated, applied its terms and reaped its benefits until it repudiated the agreement on December 27, 1991. Even after its repudiation, Respondent still wanted to enjoy the benefits without meeting its obligations. It never would have gotten the Frackville prison job had it not agreed to apply the labor agreement to its employees. Respondent cannot have it both ways.

Accordingly, I find that Respondent, by repudiating the labor agreement with Local 47, which it had adopted, violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 47, International Union of Bricklayers and Allied Craftsmen, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. All bricklayers, cement masons, plasterers, terrazzo workers and tile setters employed by Respondent, excluding all other employees, guards, and supervisors, as defined in the Act, constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material, Local 47, International Union of Bricklayers and Allied Craftsmen, AFL–CIO has been the exclusive representative for purposes of collective bargaining of all Respondent's employees employed in the unit described above in paragraph 3.
5. Respondent violated Section 8(a)(1) and (5) of the Act by repudiating the collective-bargaining agreement on December 27, 1991.
6. The aforesaid unfair labor practices are unfair labor practices effecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the poli-

[1] The Board affidavit of the Union's business agent, Ronald Hossler, who died on July 3, 1992, was admitted into evidence and considered because it meets all the requirements of Sec. 804(b)(5) of the Federal Rules of Evidence.

cies of the Act. As a remedy I shall recommend that Respondent recognize the Union and adhere to the collective-bargaining agreement until its expiration date on April 30, 1993. Respondent will make employees whole for any losses they have suffered as a result of such repudiation since December 27, 1991. This includes loss of wages and other benefits by paying into all pension funds, health and welfare funds and any other funds provided by the labor agreement. The referral system should be used in making these determinations since it was the practice utilized by the parties under the labor agreement.

[Recommended Order omitted from publication.]